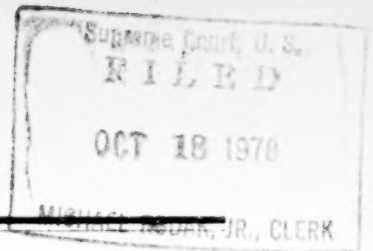


No. 78-198



In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY ANSELMO GUTIERREZ, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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Solicitor General

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 576 F. 2d 269.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. A petition for rehearing was denied on June 30, 1978 (Pet. App. B). On July 31, 1978, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including August 3, 1978. The petition was not filed until August 4, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by the district court's refusal to grant a continuance before trial.

2. Whether the district court erred in admitting into evidence a cashier's check and cashier's check request form that had been authenticated by circumstantial evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and distributing heroin, in violation of the same statutes.¹ He was sentenced to concurrent terms of four and a half years' imprisonment on each count, followed by a special parole term of six years. The court of appeals affirmed (Pet. App. A).

1. The evidence at trial showed that on July 8, 1976, Michael Vigil, an undercover agent of the Drug Enforcement Administration, met with co-conspirator Anthony Murillo and indicated that he wanted to purchase some heroin (III Tr. 24-30, 39-41). The following day Agent Vigil purchased a balloon containing heroin from Murillo and co-conspirator Mose Trujillo. Murillo stated that his suppliers were petitioner and co-conspirator James Quintana (III Tr. 42-46). During this and subsequent drug transactions, Murillo repeatedly indicated to Agent Vigil that his suppliers, petitioner and Quintana, were from New Mexico (III Tr. 42, 48-50, 56-57, 69). On August 20, 1976, Murillo introduced Agent

¹Petitioner was acquitted on a second distribution count.

Vigil to co-conspirator Isaac Ruybalid. Ruybalid later introduced Agent Vigil to his partners, petitioner and Quintana (III Tr. 74-76, 87-88). Petitioner became involved in negotiations with Agent Vigil concerning a transaction in which Vigil would exchange cash and stolen diamond rings for heroin. Agent Vigil ultimately exchanged five diamonds and \$10,000 for 15 ounces of heroin. Ruybalid stated that petitioner and Quintana obtained their heroin from a source in Culiacan, Mexico (III Tr. 124-138, 143-153).

2. On February 10, 1977, the government learned of a cashier's check and check request form, both of which were signed "Henry A. Gutierrez." The check, in the amount of \$20,000, was made payable to Margarita Sandoval, Culiacan, Mexico. On February 11, 1977, the government notified defense counsel of the existence of the check and check request form. The government supplied defense counsel with copies of both items. Petitioner immediately moved for a continuance. The district court denied the motion because it had not yet determined the admissibility of the check and request form. Trial began on Monday, February 14, 1977, as scheduled. The check and request form were presented to the court on Friday, February 18, 1977, at a hearing outside the presence of the jury. The court decided to admit the check and request form and offered defense counsel a continuance to the following Tuesday. Defense counsel declined the offer (VII Tr. 43, 61; Pet. 6-11).

ARGUMENT

1. Petitioner asserts (Pet. 10-12) that the district court erred in refusing to grant a continuance before trial following the late discovery of new evidence. He maintains that the denial of the continuance deprived defense counsel of the opportunity adequately to prepare a defense. This contention is not supported by the record.

As soon as the Assistant United States Attorney received the cashier's check and check request form, he informed defense counsel of the new evidence against petitioner and provided copies thereof. The prosecutor was not obligated to make such a pretrial disclosure either under the Constitution (see *Weatherford v. Bursey*, 429 U.S. 545, 559-561 (1977)) or by statute (see Fed. R. Crim. P. 16). Since the prosecutor was free to wait until trial to produce the new evidence against petitioner, it follows that petitioner was not entitled to a pretrial continuance.

Moreover, between the date he was given notice of the evidence and the actual presentation of the evidence at trial a week later, defense counsel had ample time to interview witnesses and otherwise investigate the facts concerning petitioner's alleged signature on the cashier's check. Defense counsel conducted no such investigation. Nor did he take advantage of the continuance offered by the district court during trial to afford him more time to prepare a defense. Petitioner has not identified any way in which he was prejudiced by the district court's failure to grant a continuance before trial. Likewise, he has not explained why the district court's offer of a continuance during trial was not the functional equivalent of the continuance requested earlier. In these circumstances, even assuming petitioner had some colorable claim to consideration of a continuance, the district court did not abuse its discretion in postponing the proposed continuance until after the court's decision on the admissibility of the check and check request form. See *United States v. Taylor*, 542 F. 2d 1023 (8th Cir. 1976), cert. denied, 429 U.S. 1074 (1977); *United States v. Anderson*, 509 F. 2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975).

2. Petitioner further contends (Pet. 12-19) that the district court erred in admitting into evidence the cashier's check and request form. He argues that the documents were not properly authenticated and were not relevant. These essentially factual arguments do not merit review by this Court. In any event, the court of appeals correctly concluded that neither objection is well-founded (Pet. App. 34-36).

In response to petitioner's assertion that the check should not have been admitted because the bank teller could not positively identify him as its purchaser, the court accurately observed (Pet. App. 35):

It is not, of course, essential that there be positive evidence in every instance in order to authenticate a document such as the cashier's check which we have before us. It can be accomplished by circumstances.

See, e.g., *United States v. Wilson*, 532 F. 2d 641, 645 (8th Cir.), cert. denied, 429 U.S. 846 (1976); *United States v. Lacopelli*, 483 F. 2d 159, 162 (2d Cir. 1973); *United States v. American Radiator and Standard Sanitary Corp.*, 433 F. 2d 174, 192 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); *United States v. Sutton*, 426 F. 2d 1202, 1207 (D.C. Cir. 1969).

The Federal Rules of Evidence reject the common law prejudice against self-authenticating documents. Rule 902(9) provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to * * * [c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law." Section 3-307(1)(b) of the Uniform Commercial Code, in turn, provides that "[w]hen the effectiveness of a signature is put in issue * * * the signature is presumed to be genuine or authorized * * *." Moreover, Fed. R. Evid. 901(a) states

that, even where extrinsic evidence of authenticity is required, the requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." By way of illustration, Rule 901(b)(4) provides that the requirement may be satisfied by "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances."

Here, the bank teller's testimony describing the purchaser of the check, as recounted by the court of appeals (Pet. App. 34), was consistent with petitioner's general description. The cashier's check for \$20,000 was signed with petitioner's name. Petitioner's name was also on the check request form. The check was sent to Culiacan, Mexico, the place that Ruybalid had identified as the source of the heroin he and his partners distributed. Ruybalid told Agent Vigil that "Quintana would usually send [petitioner] to pick up the narcotics at Culiacan" (Pet. App. 35). Other evidence established that petitioner was Murillo's supplier of heroin. Taken together, these circumstances were "sufficient to support a finding" that the check was authentic (*ibid.*). Petitioner presented no contrary evidence. In this situation, the district court properly ruled that the check's admission was not barred on authenticity grounds.²

²*United States v. Estrada*, 441 F. 2d 873 (9th Cir. 1971), on which petitioner relies, does not support his position. That case simply held, after a close factual review of the record, that the government had not produced sufficient direct or circumstantial evidence to authenticate the writings at issue. The case was decided four years before the effective date of the Federal Rules of Evidence and has no precedential value in connection with the different facts presented here. *United States v. Duncan*, 503 F. 2d 1021 (10th Cir. 1974), and *United States v. Wagner*, 475 F. 2d 121 (10th Cir. 1973), are likewise inapposite. In *Duncan* the document was excluded because the

Once the government had sufficiently established the authenticity of the documents, their relevance was readily apparent. As the court of appeals noted (Pet. App. 35):

[T]he totality of the evidence with respect to the magnitude of this enterprise, including the evidence that the heroin came from Mexico, justified the receipt in evidence of the check as bearing on the question whether Gutierrez was guilty of conspiracy by paying the purchase price for the heroin.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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proponent's witness could not identify the handwriting contained therein, and the document was not authenticated in any other way; in *Wagner* the evidence was excluded because the handwriting comparison exemplars had not been authenticated.